

Land Owner Can Flood Neighbor To Save 100 Acres of Land

by

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A recent appellate decision reinforces the rule that liability for diversion of surface water from one property to another depends upon whether the change in flow of water was a reasonable use by the owner who created the diversion. If so, there is no liability. The case is *Klokkenga v. Carolan*, 200 S.W.3d 144 (Mo. App. 2006), decided June 27, 2006.

A big obstacle to many developments is the flow of water onto the property to be developed and the transfer of water from that property onto adjacent land or a water retention basin. The diversion of surface water is a frequent and sometimes heated subject of discussion between neighbors of residential lots who engage in small-scale landscaping changes as well as large-scale subdivision developers and adjacent land owners over the development of multiple acres of previously untouched land. This case provides an excellent overview on what a developer can and cannot do.

At issue in this case was whether the owner of a farm could increase the height of a levee and a berm that supposedly caused between four and ten acres of his neighbor's crops to be "killed" due to standing water that backed up onto the property.

Carolan, the owner of the property that increased the levee and berm, testified at trial that he would lose 100 acres of his farmland if the berm and levee were removed. Klokkenga, the adjacent land owner and farmer, had sued in part seeking the removal of the newly heightened berm and levee, due to the flooding of part of his property.

Until 1993, Missouri applied the "common enemy" doctrine, which meant that surface water was a common enemy to all landowners. Thus, when a landowner including a developer improved his or her property, he or she was not responsible for damages to the neighbor's land from surface water that was diverted onto the neighbor's property due to improvements, as long as the improvements were done in a proper manner.

In 1993, the Missouri Supreme Court abrogated the common enemy doctrine in *Heins Implement Co. v. Missouri Highway & Transportation Commission*, 859 S.W.2d 681 (Mo. Banc 1993). In its place, Missouri's highest court decided that water diversion cases would be decided by applying the reasonable use standard.

The reasonable use standard does not set out any specific right or privilege regarding surface water, but rather applies the concepts of fairness and common sense to decide on a case-by-case basis what should be the result. This leaves open room for much difference of opinion in any given case.

The thrust of the reasonable use standard is that each person is legally privileged to make a reasonable use of his or her land, even though the flow of the surface water is altered thereby and causes harm to others. Liability does not occur until the interference with the flow of surface water is unreasonable, something that only a judge or jury can decide in a specific case.

The gravity of the harm to the neighbor is compared to the utility or benefit to the person who created the diversion in the flow of water. It is a balancing test, with an understanding that some harm to a neighbor can be outweighed by another's need and thus the diversion is not subject to liability.

The appellate court in *Klokkenga* reinforced and applied this standard to find that possible flooding of a few acres of another's property was justified to preserve at least 100 acres of Carolan's property. The appellate court upheld the trial court's implied conclusion that the balance of "utility and harm" favored Carolan who stood to lose the most if the levee and berm were removed.

Klokkenga had argued that the water diverted onto his property was from a "natural watercourse" and thus Carolan could not by law do this. Missouri law defines a "natural watercourse" as a stream usually flowing in a particular direction, though it need not flow continually. It must flow in a definite channel, have a bed, sides or banks and usually discharge itself into some other stream or body of water. Perhaps most importantly, a natural watercourse must be fed from some permanent source of water other than surface water.

Had the diversion been of a natural watercourse, Missouri law is that such water cannot be diverted or obstructed so as to cause the waters of it to overflow, encroach upon and inflict damage to the land of others. This is true no matter the nature of the conduct that caused the change.

In other words, the person who causes the change is strictly liable, whether the change was done innocently or with intent.

The trial court concluded in this case, however, that this was surface water and thus not subject to application of the natural watercourse rule, and the appellate court agreed.

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